



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 8, 1996

Ms. Elaine Hengren
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR96-0302

Dear Ms. Hengren:

Your predecessor asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code.¹ Your request was assigned ID# 25046.

The City of El Paso (the "city") received several requests for records relating to a police department investigation into two shootings by an El Paso police officer and any records held by the Internal Affairs Division regarding the police officer. The city claims that the requested information is excepted from disclosure pursuant to section 552.103(a) of the Government Code.

To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city contends that litigation is reasonably anticipated. To show that litigation is

¹We note that the open records laws were substantially amended by the Seventy-fourth Legislature. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, 1995 Tex. Sess. Law Serv. 5127 (Vernon). The amendments to chapter 552 "affecting the availability of information, the inspection of information, or the copying of information, including the costs for copying information, apply only to a request for information that is received by a governmental body on or after September 1, 1995." *Id.* § 26(a), 1995 Tex. Sess. Law Serv. at 5142 (Vernon). A request for information that is received by a governmental body prior to September 1, 1995, is governed by the law in effect at the time the request is made. *Id.*

reasonably anticipated, a governmental body must provide "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4.

The city received a notice of claim from an attorney representing the family of an individual who was shot and killed by the named police officer. The notice stated that the family intended to file a wrongful death claim or lawsuit against the city. In Open Records Decision No. 638 (1996) at 5, this office determined that a governmental body establishes that litigation is reasonably anticipated when it receives a notice of claim from an attorney *and* represents to this office that the notice complies with the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or any applicable city statutes or ordinances.

However, a suit for personal injuries must be brought under the act within two years of the date the cause of action arose. See Civ. Prac. & Rem. Code § 16.003 (general two-year statute of limitations for personal injuries and wrongful death); Civ. Prac. & Rem. Code § 101.006 (Texas Tort Claims Act does not affect defenses, immunities, and jurisdictional bars otherwise available). Suits that are brought under the act outside of the applicable statutory period can be dismissed. *Dalon v. City of DeSoto*, 852 S.W.2d 530 (Tex. App.--Dallas, 1992, no writ); *Bishop v. Texas*, 577 S.W.2d 377 (Tex. Civ. App.--El Paso 1979, no writ). The city indicates that litigation is not pending.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4. The shooting that was the basis of the claim occurred more than two years ago without a lawsuit being filed and you have provided no other information that would show litigation is reasonably anticipated. See Open Records Decision No. 638 (1996) at 4 (governmental body asserting section 552.103(a) exception must provide this office updates concerning changes in circumstances of underlying litigation). Thus, section 552.103(a) is inapplicable in this situation.²

The city has submitted to this office for review records of the investigation and personnel records concerning the named officer claiming that some of the information at issue is excepted from disclosure pursuant to section 552.108.³ You state that some of the documents detail law enforcement procedures and techniques relating to law

²You assert that some of the information at issue is protected from disclosure as attorney work product. We note that work product is just one category of information excepted from disclosure under section 552.103(a). See Open Records Decision Nos. 574, 575 (1990). Thus, work product is protected from disclosure as it relates to pending or reasonably anticipated litigation. In this situation, you have not shown that litigation is pending or reasonably anticipated.

³It is our understanding that there is no ongoing criminal investigation or pending prosecution concerning the shooting death of the individual. Thus, we need not address your argument as to whether an investigation is ongoing or prosecution pending.

enforcement and that release will unduly interfere with law enforcement and crime prevention. Section 552.108(b) applies to information held by a law enforcement agency if its release "will unduly interfere with law enforcement and crime prevention." Open Records Decision No. 531 (1989) at 2. When claiming this exception, a governmental body must demonstrate how release of the information at issue will unduly interfere with law enforcement and crime prevention unless the records supply the explanation on their face. See Open Records Decision No. 508 (1988) at 4. It is not obvious to this office from our review of the records, nor have you explained how release of most of the information at issue would unduly interfere with law enforcement and crime prevention

However, the city also states that releasing the names of undercover police officers identified in these documents will jeopardize their lives and eliminate their ability to work undercover. We agree that this information is excepted from disclosure pursuant to section 552.108. Thus, the city may withhold identifying information about these officers.

The information at issue contains home addresses and home telephone numbers of police officers, and a photograph of the police officer. The city asserts that this information must be withheld from disclosure pursuant to sections 552.117 and 552.119 of Government Code chapter 552. Section 552.117 provides an exception from disclosure for the home addresses and home telephone numbers of peace officers. Therefore, the city may not release the home addresses and home telephone numbers of police officers that are provided in the information at issue. Open Records Decision No. 532 (1989). The photograph of the police officer contained in the records is also protected from disclosure under section 552.119. Open Records Decision No. 502 (1988) (section 552.119 generally prohibits release of peace officers' photographs).

The city also asserts that some of the information at issue is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Some of the records at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Sections 5.08(b) and (c) of the MPA provide:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the

extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which the city police department obtained the records. Open Records Decision No. 565 (1990) at 7. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

The information at issue contains social security numbers of police officers. This office has concluded that amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers obtained or maintained by authorized persons pursuant to any provision of law enacted *on or after October 1, 1990*. Open Records Decision No. 622 (1994) at 2-3. Thus, if the social security numbers at issue were obtained or are maintained pursuant to any such provision of law, the information is confidential and may not be publicly disclosed. It otherwise is not confidential and must be disclosed.

The city also must withhold from disclosure the criminal history information contained in the records at issue. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history information that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to criminal history information it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of criminal history information obtained from DPS also apply to criminal history information obtained from other criminal justice agencies).

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Other entities specified in Chapter 411 of the Government Code are entitled to obtain criminal history information from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any criminal history record information generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any criminal history record information obtained from DPS or any other criminal justice agency must be withheld

under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

The city also contends that records concerning an offense involving juvenile suspects must be withheld from required public disclosure to section 51.14(d) of the Family Code, which provides:

Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for which a child is transferred under Section 54.02 of this code to a criminal court for prosecution, the law-enforcement files and records are not open to public inspection nor may their contents be disclosed to the public, but inspection of the files and records is permitted by:

- (1) a juvenile court having the child before it in any proceeding;
- (2) an attorney for a party to the proceeding; and
- (3) law-enforcement officers when necessary for the discharge of their official duties.⁴

We agree that, pursuant to section 51.14(d) of the Family Code, you must withhold from disclosure the juvenile records in Case No. IA91-196.

Some of the information at issue must be withheld pursuant to a common-law privacy interest under section 552.101 of the Government Code. The doctrine of common law privacy excepts from disclosure information that is highly intimate or embarrassing to a reasonable person, provided also that such information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Some of the information includes personal financial information. In Open Records Decision No. 373 (1983) at 3, this office considered personal financial information and concluded:

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and

⁴The Seventy-fourth Legislature, in House Bill 327, significantly amended portions of the Family Code governing access to juvenile records, including the repeal of section 51.14 and its substantial revision in chapter 58 of the Family Code, effective January 1, 1996. See Act of May 27, 1995, 74th Leg., R.S., ch. 262, §§ 53, 100, 105, 1995 Tex. Sess. Law Serv. 2517, 2549, 2590. We do not address in this ruling the extent to which these amendments to the Family Code affect requests for this type of information that are made on or after January 1, 1996.

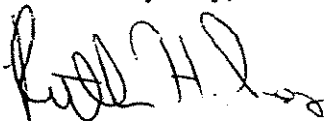
utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 (1983) at 3.

For your convenience, we have marked examples of some types of information that must be withheld from disclosure. You must withhold from disclosure the type of information we have indicated. The remaining information must be disclosed to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the fact presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/SAB/ch

Ref.: ID# 25046

Enclosures: Open Records Decision No. 638
Marked documents

cc: Mr. John Hoff
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(w/o enclosures)